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No. 98-1512

In the

Supreme Court of the United States

October Term, 1998

SANTA MONICA BEACH, LTD.,
Petitioner,

v.

THE SUPERIOR COURT OF LOS ANGELES COUNTY,
Respondent.

SANTA MONICA RENT CONTROL BOARD,
Real Party in Interest.

On Petition for Writ of Certiorari to the California Supreme Court

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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Pursuant to Supreme Court Rule 15.6, Petitioner Santa Monica Beach, Ltd. (SMB), hereby replies to the Real Party in Interest's Brief in Opposition (Opp.) filed by the Santa Monica Rent Control Board (Rent Board) on April 20, 1999.

The petition for certiorari asks this Court to decide whether, in view of the ends-means nexus test of *Nollan v. California Coastal Commission*, a regulatory takings plaintiff may be barred from presenting evidence that the application of a rent control ordinance fails to substantially advance its legitimate police power objectives. Petition for Writ of Certiorari (Pet.) at i. This reply brief is filed to respond to new points raised in the Rent Board's opposition.

I

THIS IS NOT A FACIAL CHALLENGE TO THE VALIDITY OF RENT CONTROL IN GENERAL OR TO THE VALIDITY OF SANTA MONICA'S RENT CONTROL LAW

The tone of the opposition brief is established in the first sentence of its introductory paragraph:

> This is a facial attack to a rent control law premised on the theory that the law fails to "substantially advance legitimate state interests."[1]

Opp. at 1. The Rent Board is well aware that no facial attack is involved in this litigation, but it intends to build on this initial claim to support further distortions throughout its brief. It is therefore important at the outset to ensure that the Court is not lured into error on this point.

As was stated in the petition for certiorari, "[t]he facial validity of the Rent Ordinance is not at issue in this litigation, nor does Petitioner question that providing assistance to the

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[1] This claim and variations on it are repeated throughout the opposition brief. *See, e.g.*, Opp. at 13 ("Petitioner seeks review of the constitutionality *vel non* of rent control.").

poor, minorities, students, young families, and senior citizens is a legitimate interest of government." Pet. at 3. This statement is borne out by an examination of SMB's first amended complaint, which was submitted as Appendix E to the petition. *See* App. E-2 ("[SMB] respectfully seeks an order from this Court declaring that the Santa Monica Rent Control Charter Amendment effects an uncompensated regulatory taking of property ***as applied to plaintiff***"); App. E-7 ("the Charter Amendment ***as applied to plaintiff*** violates plaintiff's federal and state constitutional rights"); App. E-8 ("The Charter Amendment ***as applied to the Property*** has deprived plaintiff of essential attributes of ownership"); App. E-9 ("Plaintiff has received no compensation for the damages inflicted by defendant's ***application of the Charter Amendment to the Property***;" "the Rent Board's ***application of the Charter Amendment to the Property*** comprises a regulatory taking of plaintiff's Property"); App. E-13 ("for an order declaring that the Santa Monica Rent Control Charter Amendment, ***as applied to plaintiff***, comprises a regulatory taking of property") (emphasis added).

In short, the Rent Board's characterization of this case as a facial challenge to the constitutionality of rent control has no basis in the reality of this litigation.

Once the Rent Board's initial mischaracterization of this case as a facial challenge is rectified, many of its subsequent assertions collapse. For example, the Board claims,

> [p]etitioner asks this Court to adopt the following rule: the takings clause, unlike the due process clause, requires a close nexus between legislative means and ends for all economic regulation.

Opp. at 2. In view of the fact that this case challenges only the application of a *specific* ordinance to a *specific* property, such

baseless hyperbole on the part of the Rent Board merits no further response.

II

THE RENT BOARD'S CLAIM THAT THIS ACTION IS TIME BARRED IS FRIVOLOUS

One of the Rent Board's objectives in mischaracterizing the nature of SMB's complaint is to enable it to make what would otherwise be seen as a patently frivolous argument: that the claim is time barred. Opp. at 3, 11-12. Both the trial court and the court of appeal ignored this claim, and the California Supreme Court declined to deal with it. App. A-8. Having seen that the Rent Board's characterization of this case as a "facial" challenge is spurious, this Court should not be distracted by such diversionary statements as:

> Petitioner's claim was filed more than 16 years after enactment of *the challenged law*. Even if *this facial case* accrued some years later, . . . this case is barred.

Opp. at 3 (emphasis added).

Chasing its own red herring, the Rent Board engages in a lengthy and pointless disquisition on the statute of limitations for facial claims. Opp. at 11-12. Taking care not to cast its net too narrowly, the Board even cites to the statute of limitations for bringing facial challenges under 42 U.S.C. § 1983 in federal court (Opp. at 11), even though this is not a facial challenge, was not brought under Section 1983, and is not in federal court.

The correct analysis of this issue is straightforward. Under California law, as-applied regulatory takings claims must be brought via a petition for writ of administrative mandamus, joined with or followed by a complaint for inverse condemnation. *Hensler v. City of Glendale*, 8 Cal. 4th 1, 14 (1994). This joint claim must be brought within the statute of limitations for administrative mandamus, which in California is 90 days. Calif. Code of Civ. Proc. § 1094.6. SMB's complaint

establishes that the underlying cause of action accrued with the Rent Board's delivery of the administrative record on January 6, 1994. App. E-7. SMB's initial complaint was filed on March 16, 1994, well within the 90-day limitations period. Court of Appeal Supplemental Record in Support of Petition for Writ of Mandate at 2.

The Rent Board admits that SMB's combined petition and complaint was timely filed within the 90-day statute of limitations for administrative mandamus as required by *Hensler*. Opp. at 12. The Board also admits that the procedurally required mandamus petition and the interlocking inverse condemnation claim "rely on the same factual allegations." Opp. at 7. No matter what the statute of limitations may be for inverse condemnation claims, it is not shorter than the 90-day period within which the complaint in this case was filed. The Rent Board's statute of limitations argument is a textbook example of a frivolous defense, and should be treated as such by this Court.

III

THE DECISION BELOW COMPLETELY DISPOSES OF SMB'S FEDERAL CLAIM AND IS RIPE FOR REVIEW BY THIS COURT

The Rent Board asserts that there has not been a final decision in this case because no hearing has been held on SMB's procedurally required administrative mandamus petition. Opp. at 3, 5, 6-11. However, as the court below recognized, such a proceeding is wholly unrelated to the final determination of SMB's federal takings claim by the decision below. *See* App. A-10-11 n.2 (administrative mandamus action addresses only whether the Board's decision denied SMB a "fair return." The larger constitutional issue that is the subject of this petition is addressed and finally adjudicated by decision below).

The test for finality for purposes of jurisdiction under 28 U.S.C. § 1257(a) is whether the order of the court below has

fully adjudicated petitioner's rights, and that adjudication is not subject to further review by a state court. *Atlantic Richfield Oil Corp. v. State Board*, 329 U.S. 69, 72 (1946). Even though ancillary state court proceedings may remain unresolved, a decision by a state's highest court is final if "the federal issue would not be mooted or otherwise affected by the proceedings yet to be had because . . . they are wholly unrelated to the federal question." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 478 (1975). Here, that requirement has been met because any further proceedings in a mandamus hearing will not ***and cannot*** affect the federal issue raised by this litigation, which has been fully and finally adjudicated by the decision below.

Proceeding with a mandamus hearing would force SMB's claims to be heard in a constitutionally inadequate forum which cannot provide the remedy of just compensation for a regulatory taking, as required by this Court in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 310-11 (1987). Moreover, facts adjudicated in this inadequate forum would have preclusive effect if the decision below is subsequently reversed and SMB is allowed a full evidentiary trial on its inverse condemnation claim. Accordingly, the decision below is final for purposes of jurisdiction by this Court under 28 U.S.C. § 1257(a).

A. California Courts Recognize That an Administrative Mandamus Hearing Is a Constitutionally Inadequate Forum to Adjudicate a Regulatory Takings Claim

As noted above, as-applied regulatory takings claims in California state courts *must* proceed by way of a petition for administrative mandamus (seeking invalidation of the offending government action) coupled with a complaint for inverse condemnation (seeking just compensation). *Hensler v. City of Glendale*, 8 Cal. 4th at 14. The Rent Board misleadingly refers to a hearing on the administrative mandamus petition as a "trial." Opp. at 5, 10. However, a mandamus hearing is a

radically different procedure from a full evidentiary trial. Such a hearing is limited to review, under a highly deferential "abuse of discretion" standard, of the record compiled by the Rent Board itself. Calif. Code of Civ. Proc. § 1094.5. This record is compiled with no regard for the due process rights of the petitioner. Evidence is inserted in or excluded from the record at the Board's discretion; the petitioner has no right to cross examine witnesses or to require that testimony be presented under oath. *See* Sharon L. Browne, *Administrative Mandamus as a Prerequisite to Inverse Condemnation: "Healing" California's Confused Takings Law*, 22 Pepperdine L. Rev. 99, 104-06, 115-16 (1994). Because of these procedural defects the California Court of Appeal has recognized that "[a]s a practical matter, there is no way a landowner can make the appropriate record for a taking claim at the administrative proceedings," *Healing v. California Coastal Commission*, 22 Cal. App. 4th 1158, 1174 (1994). Accordingly, "administrative mandate is not a substitute for a trial on the taking issues." *Id.*

B. The Constitutionally Mandated Remedy of Just Compensation for a Taking Is Not Available in a Mandamus Hearing, Which Offers Only the Prospect of a Remand to the Rent Board

The Board's most serious misrepresentation to this Court is its claim that "Petitioner can obtain all the relief it seeks in this case" via an administrative mandamus hearing. Opp. at 3. This Court has established that the constitutionally mandated remedy for a regulatory taking is just compensation. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. at 310-11. However, in a recent case in which the Rent Board was the prevailing party, the California Supreme Court established that the only remedy available via mandamus for a claim such as the one at bar is a remand to the Rent Board itself for further proceedings. *Kavanau v. Santa Monica Rent Control Board*, 941 P.2d 851, 865-66 (1997). The opposition brief fails even to mention *Kavanau*, but instead

misleadingly quotes from a pre-*Kavanau* opinion that was effectively overruled on this point by the latter decision: "'[T]he trial court is able to resolve the taking claim in the mandate proceeding.'" Opp. at 8 (quoting *Hensler v. City of Glendale*, 8 Cal. 4th at 15). Given the Board's intimate involvement with the *Kavanau* case, it is nothing short of dissembling to state:

> If Petitioner prevails on its state mandamus claim . . . *it will obtain full relief.*

Opp. at 10 (emphasis added). Thanks to the very arguments the Rent Board successfully advanced in *Kavanau*, the word "full" in the above sentence must be replaced, under current California law, by "no." The only issue that will be adjudicated before an administrative mandamus hearing is whether the Rent Board deprived SMB of a "fair return." App. A-10-11 n.2. Under *Kavanau*, the only "relief" available on this claim is a remand to the Rent Board for further proceedings. *See Kavanau*, 941 P.2d at 865-66. Thus, both the issues to be considered by and the remedy available from the mandamus hearing are unrelated to the federal constitutional question presented by this case.

C. The Decision Below Is a Definitive Ruling by the State's Highest Court on SMB's Regulatory Taking Theory

The Rent Board asserts that the decision below "precludes *one of* Petitioner's theories, but does not finally adjudge the case." Opp. at 6. In fact, however, the California Supreme Court has definitively ruled on SMB's sole legal claim implicating a federal issue: that the application of the Rent Control Law to SMB's property effects a taking by failing to substantially advance legitimate state interests. No other legal theory or issue exists in this case that is relevant to SMB's Fifth Amendment takings claim.

As the Rent Board admits, the only question that can be addressed in the constitutionally inadequate forum of an administrative mandamus hearing is whether SMB has received a "fair

return" on its property.[2] Nevertheless, as the Rent Board also acknowledges, factual findings arrived at in the constitutionally inadequate mandamus forum would be preclusive as to a subsequent evidentiary trial on the inverse condemnation claim--***even if SMB ultimately succeeds in obtaining a reversal by this Court of the decision below!*** Opp. at 10. *See Healing*, 22 Cal. App. 4th at 1178-79 ("If the administrative mandate petition is heard first, the doctrine of collateral estoppel may bar relitigation of some of the facts in the subsequent takings trial.").

SMB cannot avoid this trap by voluntarily dismissing its mandamus cause of action, since this is a procedural prerequisite to an as-applied regulatory taking claim in California. Abandoning the mandamus petition would automatically cause the entire complaint to be dismissed by the superior court on remand, following a reversal of the decision below by this Court. *See, e.g., Mola Development Corp. v. City of Seal Beach*, 57 Cal. App. 4th 405, 413-14 (1997).

In short, the mandamus petition cannot be dismissed, cannot address the federal takings issue already fully adjudicated by the court below, and cannot grant the relief mandated by this Court for a regulatory taking, yet factual findings in such a forum would be preclusive as to any subsequent proceedings in a full evidentiary trial. Accordingly, the ruling of the California Supreme Court below must be considered final for purposes of establishing jurisdiction in this Court.

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[2] The Rent Board coyly refers to the fair return issue as "the traditional element" of a takings claim, Opp. at 5, to be determined under "traditional Fifth Amendment standards." Opp. at 10. Unfortunately the Rent Board has forgotten that in *Kavanau* it persuaded the California Supreme Court to rule that the fair return issue is not an element of a takings claim at all, but instead constitutes a due process claim with a due process remedy. *Kavanau*, 941 P.2d at 865-66.

IV

THE RENT BOARD DISTORTS THE HOLDING OF *SEAWALL ASSOCIATES* IN ORDER TO EVADE THE CLEAR CONFLICT BETWEEN THE HIGHEST STATE COURTS OF NEW YORK AND CALIFORNIA

In its petition, SMB pointed to the conflict between the decision below and the opinion of the New York Court of Appeals in *Seawall Associates v. City of New York*, 542 N.E.2d 1059 (1989). In its opposition the Rent Board distorts the *Seawall* decision by stating, "[t]he court found that the law affected [*sic*] a physical occupation because it denied an owner's right to possess and exclude others." Opp. at 21. What the Rent Board does not mention is that the *Seawall* court found that New York's Local Law 9 effected ***both*** a physical and a regulatory taking. The Rent Board neither addresses the relevant, *conflicting* portion of the *Seawall* opinion, nor acknowledges to this Court that it has suppressed the relevant half of the decision.

In fact, the New York high court expressly analyzed the constitutionality of the rental housing regulations at issue in that case under the standard this Court set forth in *Nollan*: "[Whether] the burdens imposed substantially advance legitimate State interests." 542 N.E.2d at 1068 (citation to *Nollan* omitted). The court concluded:

> The heavy exactions imposed by Local Law No. 9 must "substantially advance" its putative purpose of relieving homelessness. No such showing of this required "close nexus" has been made.

Id. at 1069. Accordingly, the measure was found to be unconstitutional unless just compensation was provided under the Takings Clause. *Id.* at 1070-71.

Contrary to the Rent Board's assertions, the *Seawall* decision plainly conflicts with the opinion below in both its

method of analysis and its ultimate holding. By applying *Nollan's* substantial advancement analysis to residential rent regulations, and finding such measures unconstitutional if they fail to substantially advance legitimate state interests, the New York Court of Appeals has come into direct conflict with the highest state court of California not once, but twice. *See* discussion of *Manocherian v. Lenox Hill Hospital*, 643 N.E.2d 479, 482 (N.Y. 1994), Pet. at 26-27.

The Rent Board is ultimately reduced to attempting to distinguish these cases and *Richardson v. City and County of Honolulu*, 124 F.3d 1150 (9th Cir. 1997), *on their facts*--none of them involved a challenge to Santa Monica's Rent Control Law. Opp. at 21-22. However, as fully set forth in the petition for certiorari, each of them squarely conflicts with the decision below on the applicability of *Nollan's* ends-means analysis to local regulation of residential rental property.

CONCLUSION

For all the above reasons, and for the reasons stated in the petition, the petition for a writ of certiorari should be GRANTED.

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Respectfully submitted,

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